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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WALLACE WADE et al.,

Plaintiffs and Appellants,

v.

ANTHONY RACKAUCKAS et al.,

Defendants and Respondents.

G034650

(Super. Ct. No. 02CC05089)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Philip H. Hickok, Judge. Affirmed.

Silver, Hadden & Silver, Stephen H. Silver, and Dean Weinreich for Plaintiffs and Appellants.

Lynberg & Watkins, Norman J. Watkins, and S. Frank Harrell for Defendants and Respondents.

\* \* \*

This case arises out of the contested 2002 election for Orange County District Attorney, in which incumbent District Attorney Anthony Rackauckas was challenged by Deputy District Attorney Wallace Wade. Rackauckas won the election and immediately transferred Wade and several of his supporters from the Criminal Division to the Family Support Division, a civil division of the District Attorney's office.

A few months later, previously enacted legislation took effect that removed the Family Support Division from the District Attorney's office and reclassified its attorneys from deputy district attorneys to assistant department counsel.

Wade and the other transferred attorneys filed a complaint against Rackauckas, the County of Orange, and others in April 2002, alleging that Rackauckas transferred them in retaliation for opposing him in the election, resulting in a violation of their first amendment rights under both the California and United States Constitutions and violations of their statutory rights to engage in political activities. After the evidence was presented to a jury, the court found the statutory claims were barred by the doctrine of sovereign immunity and the constitutional claims were not supported by the weight of the evidence. On appeal, the plaintiffs challenge these rulings. We affirm.

#### FACTS

The plaintiffs are Wade, Guy Ormes, Constance Bailey, and Vickie Hix. The fourth amended complaint alleged that before their transfer, the plaintiffs were all career prosecutors employed in the Criminal Division of the District Attorney's Office. Bailey, Ormes, and Hix supported Wade's candidacy by publicly endorsing him, distributing campaign material, and hosting or appearing at his fundraisers. Bailey was subpoenaed by the Orange County Grand Jury and testified during its investigation of Rackauckas and his administration. All the political speech and conduct engaged in by the plaintiffs was in compliance with the County's policy which specifically allows employees to engage in political activity off-duty without fear of discrimination.

The first cause of action alleges the defendants had violated the plaintiffs' rights to freedom of speech and to petition, which are guaranteed in Article 1 of the California Constitution, and sought declaratory and injunctive relief as well as damages. The second cause of action alleges the County had violated Labor Code sections that prohibit adverse action against an employee for engaging in lawful conduct during nonworking hours away from the employer's premises. The third cause of action alleges

the County had violated Labor Code section 1101 by making, adopting, or enforcing a rule or policy that “forbid[s] or prevent[s] employees from engaging or participating in politics or from becoming candidates for public office” or “control[s] or direct[s] . . . the political activities or affiliations of employees.” The fourth cause of action alleges the County violated Labor Code section 1102, which provides: “No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.” The fifth cause of action, on behalf of Bailey only, alleges the County violated Labor Code section 1102.5, subdivision (b), which prohibits retaliation by an employer against an employee for disclosing information to a government or law enforcement agency. The sixth cause of action alleges the plaintiffs are entitled to civil penalties for the County’s violation of the Labor Code sections specified in the second through fifth causes of action.

The case went to trial in June 2004. Right before trial, the court granted judgment on the pleadings for the second and sixth causes of action; it also ruled that the plaintiffs had no tort claim for damages under the California Constitution as pleaded in the first cause of action. The court ruled the injunctive and declaratory relief prayed for in the first cause of action would be decided by the court rather than the jury.

At trial, Wade testified he decided to run for District Attorney against Rackauckas because “first, I thought I would be a good District Attorney. . . . [¶] The second reason was Mr. Rackauckas’ record. There had been allegations of misconduct in the media. I had spoken to many deputies myself and read the media accounts. I thought there were serious issues with regard to Mr. Rackauckas’ stewardship of the office. Favoring political supporters in making decisions. The way personnel were being treated, suspended, fired. Personnel records showing up in newspapers the day that somebody has walked out of the building, that could only have come from the 10th floor,

which is where the executive offices are. Generally just the entire honor and integrity of the District Attorney's office I thought was failing in the eyes of the police, law enforcement, among many other deputies. I thought there were severe morale problems caused by Mr. Rackauckas' actions, and that of his top staff. . . . [¶] The third reason was I thought I had a reasonable chance of winning the election. . . . [¶] And the fourth reason was that despite my efforts I could not find anyone else that I thought could win to run for District Attorney." Wade agreed that one of the major issues in the campaign was Rackauckas' lack of integrity. Wade believed Rackauckas lacked integrity and accused him of it "in so many words."

Hix, Ormes, and Bailey supported Wade because they too were concerned about Rackauckas' integrity. They actively supported Wade, and Rackauckas was aware of their support.

The election was in March 2002. At that time, the office had a policy of rotating positions every six months. The defendants concede that the transfers of the plaintiffs to the family support division were not part of the normal rotation policy. Michael Clesceri, an assistant investigator in the DA's office, testified Rackauckas told him well before the 2002 election that "he's got a lifeboat and he can put seven people in it when family support splits off into its own separate agency, and Wally Wade was always in the lifeboat. And then whoever disagreed with his policies he was going to put in that lifeboat, and they would never be part of the D.A.'s office again."

Rackauckas testified on the eve of the election, "there was a creation of turmoil, disruption, and even fear of supporting me. . . . [T]here was such a strong opinion or such a strong statement by these people that 'If you're against us, you're a crook just like the D.A.' And it was just a terrible situation." Rackauckas explained, "[I]t's very very important to have a trust relationship between myself and the deputies and between the deputies and me." By the time of the election, Rackauckas perceived that "many of the deputies, as well as other law enforcement personnel, had a very

difficult time trusting that I was making decisions in good faith and [in] the best interest of the people of our community.” And Rackauckas had lost trust in the plaintiffs to represent the policies of the District Attorney in court and in public. He lost trust in them “because of the way the entire campaign was conducted. The manner of using the networks that were developed over years of friendships with various people in law enforcement and in the district attorney’s office throughout the county. The whisper gossip campaign. The accusations against me as a corrupt official. And the knowledge, basically, that this is the core group of people who are involved – engaged in that throughout the office and other law enforcement agencies in the county, caused me to lose trust in them.”

Rackauckas decided to transfer the core group of “detractors” to the family support division as a way of taking action “that would let people know that when this election is done, it’s behind us and we’re going to get back to work and we’re going to carry out our mission as a unit. As a team.” The transfers were not discipline, but were intended to “bind the office together” and “improve the morale of the office overall . . . .” Rackauckas chose the family support division because it was in a different building from the central District Attorney’s office. “The family support division was really not centrally engaged in this whole gossip accusation campaign, and it would get these people out of that mix of talking every day and stirring the pot and doing those things. And it would also let other people in the D.A.’s office know that they’re not there, and that we’re going to work as a team and we’re not going to have all of these distractions within the office.” Rackauckas did not want to wait until the next regular rotation to make the transfers because he wanted to show decisive leadership and “I didn’t think this would be appropriate or productive to have some kind of a pretense where we might try to hide it in a regular rotation.”

After the presentation of evidence, the court granted a nonsuit on Bailey’s fifth cause of action in favor of the County. The County filed a motion for directed

verdict with respect to the remaining causes of action, the third and fourth. The plaintiffs submitted their response to the motion the same day the jury began deliberating. That afternoon, the trial court granted the County's motion, finding the claims were barred by the doctrine of sovereign immunity, and discharged the jury. The court then held a hearing on the remaining claims for injunctive relief, ultimately denying them.

## DISCUSSION

On appeal, the plaintiffs challenge only two of the trial court's rulings: (1) the directed verdict on their causes of action for damages under Labor Code sections 1101 and 1102, and (2) the denial of injunctive and declaratory relief for violations of their first amendment rights as alleged in the first cause of action.

*The causes of action under Labor Code sections 1101 and 1102  
are barred by governmental immunity.*

The plaintiffs challenge the directed verdict on their third and fourth causes of action, which allege violations of the public policies articulated in Labor Code sections 1101 and 1102. The trial court ruled that the statutory scheme of which these sections are a part does not authorize civil litigation against a public employer. Plaintiffs claim the trial court incorrectly interpreted the statutes and they must be given a new trial on those causes of action.

The 1963 Tort Claims Act established "governmental immunity from suit [as] the rule and liability the exception." (*Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1202.) "Government Code section 815, enacted in 1963, abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution. Thus, in the absence of some constitutional requirement, public entities may be liable *only* if a statute declares them to be liable." (*Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, 409.) The plaintiffs argue Labor Code section 1106 authorizes public employees to bring a tort action for damages against their public employers. We disagree.

In 1915, the Legislature enacted a series of statutes designed to protect employees' political freedom. These sections now appear in the Labor Code as part of the chapter identifying political affiliations as one of the privileges and immunities from employer regulation and supervision. Labor Code section 1101 provides: "No employer shall make, adopt, or enforce any rule, regulation, or policy: [¶] (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. [¶] (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." Section 1102 provides: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

The Legislature provided that a violation of the chapter by an employer would constitute a misdemeanor, punishable by fine and/or imprisonment (§ 1103) and that the employer would be responsible for the acts of his managers, officers, agents, and employees (§ 1104). It also gave employees a right of action for damages against their employers for violation of these sections (§ 1105): "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter." (See also *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County* (1946) 28 Cal.2d 481, 486.)

In 1984, the Legislature added the "Whistleblower Protection Statute" to the chapter in the form of section 1102.5. (Baker, *The Strongest Whistleblower Protection Law, etc.* (2004) 35 McGeorge L.Rev. 569.) This section prohibits employers from preventing employees from disclosing a suspected violation of a state or federal law and also prohibits retaliation against them. Then, in 1992, section 1106 was added, which read at the time: "For purposes of Sections 1102.5, 1103, 1104, and 1105, 'employee' includes, but is not limited to, any individual employed by the state or any

subdivision thereof, any county, city, city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California.” (Former § 1106.) Thus, section 1106 specifically authorizes public employees to bring a civil action for damages against their public employers for violations of the whistleblowing statute embodied in section 1102.5.

Appellants argue that section 1106 should be read to allow public employees to bring a civil action for damages against their employers for violations of sections 1101 and 1102, notwithstanding their omission from the statute, because section 1106 applies its definition of employee as one employed by a public entity to section 1105. And section 1105 allows a tort action for violations of section 1101 and 1102.

The legislative history of section 1106, however, supports what we think is a plain reading of the section: The Legislature intended to extend whistleblower protection to public employees. “The Senate Committee on Industrial Relations explained that while existing law prohibited employers from retaliating against employees who disclosed to governmental or law enforcement agencies information relating to violations of state or federal law, ‘These provision are silent as to their applicability to public employees. Generally, however, provisions of the Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees.’ (Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) as amended April 21, 2001 [2002], p.2.) The report explained that the bill arose from a case in which a local building inspector complained of retaliation because he reported to the police that his supervisor had ordered him to violate the building inspection law. (*Id.* at p. 3.) The district attorney declined to prosecute the supervisor, however, because the Labor Code’s anti-retaliation provisions applied to private sector employees only. (*Ibid.*) [¶] The Senate Rules Committee’s Third Reading Analysis reported these arguments to support the bill: It would give

public employees the same right of redress against retaliation for whistle blowing as the private sector enjoys; it would encourage employees to report illegal activities without fear of retaliation; state employees' existing remedies were meaningless because they were required to prove malice; public employees had little protection because they had to file a complaint following the local agency's procedure, and the supervisor who was responsible for the retaliation often heard the first level of grievance. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) as amended April 21, 1992, pp. 2-3.)" (*Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 330-331.)

Plaintiffs alternatively argue they should be allowed to apply a new theory of recovery to the facts pleaded and proved at trial because those facts establish a violation of Government Code section 3203, which specifically protects the rights of public employees to engage in political activities. "Except as otherwise provided in this chapter, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a state or local agency." (Gov. Code, § 3203.) Plaintiffs argue the violation of this section establishes causes of action for wrongful discharge under *Tameny v. Atlantic Richfield* (1980) 27 Cal.3d 167, which allowed an employee to recover tort damages from his employer if he was discharged for a reason in violation of fundamental public policy. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 887.)

The plaintiffs acknowledge the general rule that an appellant cannot raise a new theory of recovery for the first time on appeal. (*People Ex Rel. Dept. of Transp. v. Superior Court* (2003) 105 Cal.App.4th 39, 46; Eisenberg et al., Cal Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶8:229, p. 8-135.) But they argue that we should apply an exception to the general rule because the theory raises a question of law based on the facts established at trial and it raises important policy considerations. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 655.)

The plaintiffs rely on *Dudley v. Dept. of Transportation* (2001) 90 Cal.App.4th 255. There, an employee filed an action against her former employer, a state agency, under the Fair Employment and Housing Act. (*Id.* at p. 257.) The employee alleged that her supervisor harassed her about documentation for her time off, she was subjected to stricter attendance requirements than other employees, and she received salary reduction and suspensions after returning from medical leaves. (*Id.* at p. 258.) After a federal court ruling on her concurrent claim under the Americans with Disabilities Act, the trial court granted the employer's motion for judgment on the pleadings. (*Id.* at p. 259.) On appeal, the employee contended that her complaint could be amended to allege a valid cause of action for retaliation in violation of the Moore-Brown-Roberti Family Rights Act (Gov. Code, § 12945.1, 12945.2.) (*Id.* at p. 257.)

The appellate court reversed the judgment and remanded with directions to the trial court to allow the employee to amend her complaint. (*Dudley v. Dept. of Transportation, supra*, 90 Cal.App.4th at p. 268.) Rejecting the argument that the employee should not be allowed to raise a new theory on appeal, the court explained that a motion for judgment on the pleadings “‘is the functional equivalent of a general demurrer . . . . Indeed, the only significant difference between the two motions is in their timing.’” (*People v. \$20,000 U.S. Currency* (1991) 235 Cal.App.3d 682, 691.)” (*Id.* at p. 259.) An appellant may advance a new legal theory on appeal when a demurrer is sustained without leave to amend “‘because of the general rule that “‘a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts.’” [Citation.]” (*Ibid.*)

The situation here is not a pleading case and does not present the functional equivalent of a demurrer. When the third and fourth causes of action were dismissed, both sides had rested and the case had been given to the jury. Furthermore, the facts relevant to a violation of Government Code section 3203 were not undisputed. The Plaintiffs' assertion of a new legal theory is simply too late.

*The trial court's denial of injunctive relief must be affirmed  
because no constitutional violation occurred.*

The plaintiffs contend the trial court should have granted them injunctive relief in the form of reinstatement to the Criminal Division because the transfers to the Family Support Division violated their First Amendment rights to free speech. They correctly point out that “a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment” (*Connick v. Myers* (1983) 461 U.S. 138, 1401), even if the target of his speech is the governmental agency for which he works (*Waters v. Churchill* (1994) 511 U.S. 661).

The defendants do not seriously challenge the characterization of the plaintiffs’ speech as relating to a matter of public interest. Their activities were designed to inform the public about the candidates for a governmental office and to influence public opinion. Speech that “enable[s] . . . members of the public to make informed decisions about the operation of their government merits the highest degree of first amendment protection . . . .” (*McKinley v. City of Eloy* (9th Cir. 1983) 705 F.2d 1110, 1114.) Whether that constitutional protection applies here requires us to “balance . . . the interests of [each plaintiff], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” (*Pickering v. Board of Education* (1968) 391 U.S. 563, 568.)

Defendants contend no balancing test need be applied because District Attorneys are accorded “wide discretion and control over the management of [their] personnel and internal affairs.” (*Connick v. Myers* (1983) 461 U.S. 138, 151.) They point to those cases that allow high level officials to fire certain types of governmental employees for purely political reasons without offending the Constitution. (*Branti v. Finkel* (1980) 445 U.S. 507, 520; *Elrod v. Burns* (1976) 427 U.S. 347, 367.)

*Branti* and *Elrod*, which dealt with the practice of patronage, i.e., the discharge by a public official of an employee who does not share the official's political persuasion, provided the genesis for this so-called policymaker exception. *Elrod* held that patronage dismissals must be limited to policy-making positions. (*Elrod v. Burns*, *supra*, 427 U.S. at p. 367.) *Branti* refined the test for assessing whether a public employee's dismissal based on party affiliation offends the First Amendment: "The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." (*Branti v. Finkel*, *supra*, 445 U.S. at p. 518.) The Supreme Court has since held that "the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support . . . ." (*Rutan v. Republican Party of Illinois* (1990) 497 U.S. 62, 65.)

The defendants cite *Fazio v. City and County of San Francisco* (9th Cir. 1997) 125 F.3d 1328 as support for their assertion that public prosecutors of whatever rank are subject to discharge, transfer or demotion for purely political reasons. Fazio was a Head Attorney in the homicide division of the district attorney's office. As such, he handled high profile cases and was often quoted by the media on matters of general public interest as well as on matters being handled by the district attorney's office. When he decided to run against the incumbent district attorney, he was fired. In finding Fazio to be a policymaker, the court relied on two out-of-circuit cases that held assistant district attorneys to be policymakers because their duties included the potential for making policy decisions. (*Mummau v. Ranck* (3d Cir. 1982) 687 F.2d 9; *Livas v. Petka* (7th Cir. 1983) 711 F.2d 798.) It also considered factors gleaned from other cases: "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. (*Hall*

*v. Ford*, 272 U.S. App. D.C. 301, 856 F.2d 255, 262 (D.C. Cir. 1988).” (*Fazio v. City and County of San Francisco*, *supra*, 125 F.3d at p. 1334.)

The *Fazio* court also relied on Fazio’s at-will status to support its conclusion. It distinguished a prior case in which it had found a district attorney could not suspend a deputy district attorney without due process. “As for our decision in *Finkelstein* [*v. Bergna* (9th Cir. 1991) 924 F.2d 1449], a key fact in that case differs from the case at hand. Finkelstein’s position was a civil service position, while Fazio’s position was an at-will position. As a civil service employee, Finkelstein had a property interest in his job as a deputy district attorney, unlike Fazio. The *Finkelstein* panel cited with apparent approval several out-of-circuit cases that held that at-will Assistant District Attorneys could be dismissed for political reasons without offending the First Amendment.” (*Fazio v. City and County of San Francisco*, *supra*, 125 F.3d at pp. 1332-1333.)

The plaintiffs here were not at-will employees, but were members of the county’s merit system. Furthermore, none of them had policymaker powers or responsibilities. Although Wade had been a member of management as an Assistant District Attorney prior to 1998, when Rackauckas took office he demoted Wade from a grade 5 to a senior deputy district attorney, grade 4. Wade testified, “As a senior 4 I was a line trial deputy. I had a case load. And I would get the information from investigators, talk to witnesses, decide whether or not to file cases, decide what charges to file. . . . I did not have responsibilities for supervision of other deputies, training of other deputies, evaluation of other deputies, setting office policies.” As a manager, Wade both called and attended meetings of executive personnel. “There were meetings that all of the supervisory-type managers, the 5s, would attend. Promotional meetings, . . . transfer meetings, rotational meetings. And then as an assistant division director I would meet not only with my 5s, but I also would meet with executive management, the other assistants, Mr. Capizzi [Rackauckas’ predecessor], Mr. Evans, his chief assistant, the

head of the bureau of investigation, the administrative manager, the person who made the place run.” As a senior 4, Wade attended no management meetings, had no responsibility for assigning cases to other deputies, had minimal interaction with the media, and met with no outside agencies other than the investigators on his cases.

Ormes’s circumstances were similar to Wade’s. Ormes was a grade 5 district attorney and supervised the felony panel. He had no case load of his own, but supervised and evaluated the deputies under him. He talked to the judges on the criminal panel about “how the attorneys were doing, whether the judges saw a need for improvement . . . .” After Rackauckas was elected in 1998, “they announced that they were going to do away with the grade 5 positions. They were going to create a new first line supervisor assistant called assistant district attorney, and it would be an at-will position. . . . In other words, the people who were in that position could be reduced in rank, without the traditional cause that . . . was required of a grade 5 position. The executive manager assistant positions would receive more money, they would also receive a car allowance, some kind of contribution to retirement or deferred comp, something of that nature. And they were supposedly going to have greater responsibility. More people to supervise than we did as grade 5s.” Although he applied for one of the new assistant positions, Ormes was not chosen. Instead, he was demoted to a senior deputy district attorney, grade 4, with no supervisory duties or policy input.

Hix was a senior attorney grade 4 and Bailey was a grade 3 at the time of the transfer. Rackauckas did not offer any evidence suggesting that any of the plaintiffs had the attributes of a policymaker; rather, he urges us to hold that all prosecutors are policymakers as a matter of law. We decline to do so.

Having determined that the plaintiffs were not policymakers, we return to the balancing test under *Pickering v. Board of Education*, *supra*, 391 U.S. 563. The plaintiffs established that their speech concerned a matter of public interest; they must next establish that their speech “was a ‘substantial factor’ or to put it in other words, that

it was a ‘motivating factor’” in Rackauckas’ decision to transfer them. (*Mt. Healthy City School District v. Doyle* (1977) 429 U.S. 274, 287.) We find they have done so. The evidence clearly shows that Rackauckas transferred the plaintiffs to the family support division because of their vocal opposition to him in the 2002 election. Rackauckas candidly testified the plaintiffs and the others he transferred were the core group of opposition to him; he wanted those deputies physically removed from the rest of the office.

When an employee carries the initial burden of showing his speech was constitutionally protected and his conduct was a motivating factor for the adverse employment action, the burden shifts to the employer to show the adverse action against the employee was justified by “the government’s interest in the effective and efficient fulfillment of its responsibilities to the public. . . . [¶] To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.” (*Connick v. Myers, supra*, 461 U.S. at 150-151.) Rather than laying down a general standard, the Supreme Court requires the courts to conduct a fact-intensive balancing process of the government’s interest and the employee’s interest in free speech. (*Rankin v. McPherson* (1987) 483 U.S. 378, 388; *Pickering v. Board of Education etc., supra*, 391 U.S. at pp. 566-569.)

The trial court found the plaintiffs’ transfers served a legitimate governmental interest. It stated, “[B]ased upon the evidence here, at some point in time, over time the personal statements by [the plaintiffs] and others damaged office morale, fostered gossip within the office. It broke apart office friendships. [¶] . . . Over time it impaired the discipline or the control by supervisors. It disrupted co-worker

relationships. It definitely eroded loyalty and confidentiality, especially from what I have heard with regard to law enforcement organizations, the courts, the grand jury and probably also the citizens of Orange County, bottom line. And, also, it obstructed . . . the operation of the office.” In effect, the trial court found the transfers were not in response to the plaintiffs’ exercise of their First Amendment rights but were in response to the post-election disruption of the office caused by the exercise of those rights.

There was extensive evidence in the record that supports the trial court’s factual findings, not only the testimony of Rackauckas, but testimony of deputy district attorneys. Because substantial evidence supports the trial court’s findings, we must defer to them.

#### DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

O’LEARY, J.